85-1977
No. ____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OIL INSURANCE LIMITED,

Petitioner,

—against—

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,

—and—

A.I.U. INSURANCE COMPANY, AMERICAN HOME INSURANCE COMPANY, BIRMINGHAM INSURANCE COMPANY, CHUBB & SON INC., FEDERAL INSURANCE COMPANY, FROUDE AND COMPANIES, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MISSION INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, SEA INSURANCE COMPANY, LTD., SUN INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

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May 30, 1986

40 pp

QUESTIONS PRESENTED

Under the constitutional guaranty of due process and the public policy favoring enforcement of arbitration clauses in international agreements, may a California court exercise personal jurisdiction over the Bermuda insurer of a Texas-based insured to adjudicate the claim of commercial insurers, which in many cases are not based or even admitted in California, that their insurances are excess of the insurance provided the insured by the Bermuda insurer when:

- the Bermuda insurer transacts its business entirely outside California and the United States;
- the Bermuda insurer is a mutual-type insurer which insures the world-wide risks of the thirty-five foreign and domestic petroleum companies which are its shareholder-insureds;
- the uniform insurance policies issued by the Bermuda insurer provide for the collective benefit of the shareholder-insureds that all coverage or other disputes concerning the insurance must be resolved by arbitration in London; and
- the claim of the commercial insurers necessarily presents a dispute concerning the coverage of the insurance provided by the Bermuda insurer?

PARTIES BELOW

All parties participating in the proceedings before the California Court of Appeal are named in the caption.

Pursuant to Rule 28.1 of the Rules of the Court, Oil Insurance Limited ("O.I.L") states that it is a mutual type insurance company, based in and incorporated under the laws of Bermuda, and that it has the following subsidiaries or affiliates: Oil Investment Company Limited and Oil Casualty Insurance Limited.

The shareholder-insureds of O.I.L. are:

Ashland Oil, Inc.

Atlantic Petroleum Corporation

Atlantic Richfield Company

The Burmah Oil Public Limited Company

Chevron Corporation

Coastal Offshore Insurance Limited

Consolidated Natural Gas Company

Crown Central Petroleum Corporation

Danube Insurance Limited and Wabash Insurance Limited

Eastern Hemisphere Insurance Limited

Finas Company Limited

Forest Oil Corporation

Greenstone Assurance Ltd.

H B Insurance Limited

Highwood Limited

Jamestown Insurance Company Limited

Kerr-McGee Corporation

Koch Industries Inc.

Loop Inc.

The Louisiana Land and Exploration Company

Marathon Oil Company

Murphy Oil Corporation

N. I. Limited

Noble Affiliates, Inc.

Northern Resources Insurance Co. Ltd.

Pan Insurance and Reinsurance Company Limited

Petrofina S.A.

Phillips Petroleum Company

Piper Indemnity Ltd.

Shell Oil Company

Solen Insurance Limited

The Standard Oil Company (Ohio)

Sun Company, Inc.

Tenneco Inc.

Unocal Corporation

Vista Chemical Company

Wasatch Insurance Limited

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

Petitioner Oil Insurance Limited ("O.I.L.") prays that a writ of certiorari issue to review the final decision of the Court of Appeal of the State of California, First Appellate District, Division Three, entered in this proceeding on February 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, issuing a peremptory writ of mandate ordering the respondent Superior Court in and for San Mateo County to vacate its order quashing service of process upon O.I.L., is reported at 177 Cal. App. 3d 381, 222 Cal. Rptr. 880, and is set forth in the appendix to this petition at 1a-11a.[1] That court's unreported opinion denying rehearing is set forth at 12a. The order of the California Supreme Court denying O.I.L.'s petition for review has not been officially reported; it is set forth at 13a. The unreported decision of the respondent San Mateo Superior Court granting O.I.L.'s motion to quash is set forth at 14a-15a. The Superior Court's order to the same effect is set forth at 16a-17a.

JURISDICTION

The decision of the Court of Appeal of the State of California issuing the peremptory writ of mandate was filed on February 6, 1986 (1a-11a). O.I.L.'s timely motion for rehearing was denied on March 5, 1986 (12a). The Supreme Court of the State of California thereafter declined to review the decision of the Court of Appeal by order filed on May 21, 1986 (13a).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3) (1982).

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1 Citations to "__a" refer to appropriate pages of the appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

California Code of Civil Procedure Section 410.10 (West 1973) provides in pertinent part:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

STATEMENT OF THE CASE

In October 1983, Shell Oil Company, a Delaware corporation headquartered in Texas ("Shell"), brought a declaratory judgment action in the Superior Court for San Mateo County against its comprehensive general liability ("CGL") insurers to obtain a declaration of rights and obligations in respect of Shell's alleged liability for damages and the costs of clean-up of two waste sites, one located near Denver, Colorado and the other located in Fullerton, California. Shell did not join petitioner O.I.L. as a defendant because:

> "the definition of 'occurrence' in the O.I.L. policies is different from that of the policies issued to Shell by defendants. Shell's policies from defendants cover property damage and bodily injury during the policy period irrespective of when the event or continuous exposure to conditions giving rise thereto occurred. The O.I.L. policies, however, cover only property damage or bodily injury caused by 'an event or continuous or repeated exposure to conditions which *commence* during' the policy period (emphasis supplied). Shell at the times that it gave notice to its insurers of the conditions at the two waste sites in question determined that there was no

> coverage under the O.I.L. policies, i.e., that those conditions were caused by events or continuous exposure to conditions that *commenced* in the 1940's, 1950's or possibly 1960's and in any event long prior to the inception of its first O.I.L. policy on January 1, 1976. Shell determined that it did not have a claim against O.I.L. and consequently it did not give notice of these situations to O.I.L. . . ." (Affidavit of Harry L. Reed, General Attorney of Shell, in Support of Oil Insurance Limited's Motion to Dismiss for Lack of Personal Jurisdiction, sworn to January 2, 1985, ¶ 6).

Shell has also said

> "If, contrary to Shell's determination that it does not have a claim against O.I.L., it were to be decided that O.I.L. was bound to respond for any portion of Shell's putative liability in the underlying actions, Shell, would, of course, not hold its other insurers responsible for that portion." (*Ibid.*)

Notwithstanding the foregoing, certain of the CGL insurers named as defendants by Shell cross-complained against O.I.L. for a declaration that their insurance is excess of that provided by O.I.L. These cross-claiming insurers—the insurance companies and Lloyd's underwriting syndicates named in the caption —do not claim that they have transacted any business with O.I.L., let alone business having some contact with California. They are based and doing business worldwide and (in many cases) not admitted in California.

O.I.L. is a mutual type insurance company based in and incorporated under the laws of Bermuda. Its shareholder-insureds consist of some thirty-seven large petroleum companies, including English, Italian, French, Belgian and Canadian companies as well as American companies such as Shell. In order to obtain insurance from O.I.L., a petroleum company must first become a shareholder in O.I.L. and thereby agree with all other shareholders of O.I.L. to the provisions of the O.I.L. Shareholders' Agreement. Shell first became a share-

holder-insured of O.I.L. in 1976, four years after O.I.L. was founded in 1972.

The policies issued by O.I.L. to Shell, like every other policy ever issued by O.I.L., expressly provide that the only means by which disputes thereunder are to be resolved is in London by arbitration: "Any dispute between the Assured and Underwriter arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended, by a Board composed of three arbitrators to be selected for each controversy. . . ."

On January 4, 1985, O.I.L. moved to quash service and dismiss the cross-claims asserted against it for want of personal jurisdiction, arguing that it did not have the requisite "minimum contacts" with California under the Due Process Clause of the United States Constitution and that the exclusive forum for resolution of coverage questions under its policies was arbitration in London. The Superior Court granted the motion on August 8, 1985 (14a-15a).

On or about October 7, 1985, the cross-claiming CGL insurers filed a petition for a writ of mandate in the California Court of Appeal claiming that the dismissal of their cross-complaints for lack of personal jurisdiction was clearly erroneous and an abuse of discretion. On February 6, 1986, the Court of Appeal filed its decision ordering that a writ of mandate issue directing the San Mateo Superior Court to vacate its order quashing service of process upon O.I.L. (1a-11a). The Court of Appeal denied rehearing of that decision on March 5, 1986 (12a). O.I.L. thereupon filed a timely petition for review in the California Supreme Court, which was denied on May 21, 1986 (13a).

The facts relevant to how O.I.L. conducts its business, as stated by the Court of Appeal, are the following:

> "O.I.L. is a mutual insurance company based in and incorporated under the laws of Bermuda. Its sole office is

there and its officers and employees are all residents of Bermuda. All of its insurance policies have been issued in Bermuda, and O.I.L.'s shareholders' agreement, pursuant to which the policies are issued, has been signed by each shareholder/policyholder in Bermuda or in another location outside the United States. O.I.L. is not and has not been taxed by the United States or any state of the United States.

"During the formation of O.I.L. in 1972, the five oil company representatives participating in its formation had contact with California. One was a California resident. Others communicated with him by letter and telephone. O.I.L. was created in part because of the reaction of traditional insurers to the Santa Barbara oil spill.

"O.I.L.'s shareholders/policyholders are 35 large petroleum companies. In order to obtain insurance, a company must become a shareholder in O.I.L. and agree to the provisions of the shareholders' agreement. The terms of each insurance policy are prescribed by exhibits to the shareholders' agreement. The policies expressly provide that the only means for resolving disputes thereunder is by arbitration in London, applying New York law. In the 13 years of O.I.L.'s existence, no suit concerning a policy claim has ever been brought or threatened in a court in the United States or any foreign country. O.I.L. has not anticipated that it would be haled into court in California.

"Three of O.I.L.'s shareholders/policyholders are major oil companies headquartered in California: Atlantic Richfield Company, Chevron Corporation, and Unocal Corporation. O.I.L. has sent copies of its policies of insurance from Bermuda to these shareholders/policyholders in California, and it has received over $145 million in premiums from those three companies since 1972. The insurance policies sent to California were merely convenience copies, not binding contracts.

"These California-based oil companies and other shareholders/policyholders of O.I.L. have substantial assets and insure substantial risks in California. However, O.I.L. provides world-wide coverage for its insureds calculated without regard to location of the various assets. Since its creation in 1972, O.I.L. shareholders/policyholders have submitted claims for losses in California totaling over $34 million, and O.I.L. has made payments of over $25 million for such claims. O.I.L. has sent persons from United States affiliates of nonexclusive agents to California in connection with the adjustment of claims for losses in California. Certain claims payments have been sent by wire transfer to banks located in California, and O.I.L. has received wire transfers of premium payments from one shareholder/policyholder's California bank account. Two members of O.I.L.'s board of directors are residents of California.

"Less than 10 percent of O.I.L.'s shareholders/policyholders are headquartered in California, and less than 15 percent of the total premiums received by O.I.L. have been from California shareholders/policyholders. Only 3 of 188 claims made against O.I.L. have involved losses in California (two refinery fires and storm damage to an offshore oil facility)" (2a-4a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT HAS RECENTLY GRANTED CERTIORARI IN THE POTENTIALLY DISPOSITIVE CASE OF *ASAHI METAL INDUSTRY CO.* v. *SUPERIOR COURT*

The test of constitutionally permissible exercise of personal jurisdiction is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Because O.I.L. does not transact any business in California or elsewhere in the United States and its policies provide exclusively for arbitration in London, O.I.L. with good reason has not anticipated being haled into court in California. In support of their contention to the contrary, the cross-claiming CGL insurers argued that the case of *Asahi Metal Industry Co.* v. *Superior Court*, 39 Cal.3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), "mandates a finding of 'minimum contacts' " here[2] and the court below relied upon that authority (5a).[3] On March 3, 1986, the Court issued a writ of certiorari to review *Asahi*, 106 S. Ct. 1258 (1986).

Like Asahi, O.I.L. is a foreign corporation with no office, property or agents in California. O.I.L. has been haled into a California court as a third-party defendant, again like Asahi. The indemnity claim against Asahi by the cross-complainant in that case most likely depends upon the laws of Taiwan or Japan. The claim of the cross-claiming CGL insurers here—

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2 Reply Memorandum in Support of Petition for Writ of Mandate dated October 23, 1985 at 5-6; *see also* Memorandum in Support of Petition for Writ of Mandate dated October 7, 1985 at 30-34.

3 The cross-claiming insurers said in their answer to O.I.L.'s petition for review in the California Supreme Court, dated April 7, 1986 at 4, that the Court of Appeal "painstakingly followed over 40 years of precedent on the issue of jurisdiction . . . culminating" in *Asahi*.

that their insurance of Shell is in excess of that provided by O.I.L.—certainly depends upon O.I.L.'s insurance contract, which provides for dispute resolution by arbitration in London and which is explicitly governed by the law of a jurisdiction other than California.

The basis of jurisdiction in *Asahi* was Asahi's sale of a component, alleged to be defective, to the manufacturer of a consumer product with the expectation that the product would be sold in California. The California Supreme Court emphasized California's "stong interest in protecting its consumers. . . ." 39 Cal. 3d at 53, 702 P.2d at 553, 216 Cal. Rptr. at 395. California's interest in assuming jurisdiction over a foreign nonadmitted mutual insurer of major oil companies in a suit by a Texas-based insured is obviously less than its interest in assuming jurisdiction over a manufacturer of an essential component of a consumer product in a suit by an injured California resident.

O.I.L. submits that even if *Asahi* is affirmed, it would not comport with due process and public policy to exercise jurisdiction over O.I.L. If *Asahi* is reversed, it would follow *a fortiori* that the decision below should be reversed. Due to the overlapping issues raised by the California courts' exercise of jurisdiction in *Asahi* and the case at bar, O.I.L. respectfully submits that, if this petition is granted, the two cases might appropriately be set down for argument together before the Court.

II.

THE EXERCISE OF PERSONAL JURISDICTION OVER OIL INSURANCE LIMITED RAISES IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW AND PUBLIC POLICY

In the United States and California there is an insurance crisis. Indemnity often is unavailable and is restricted in scope and extremely expensive when it is available. Businesses needing insurance increasingly are turning to mutual insurers such as O.I.L. If commercial insurers are permitted to drag overseas mutual insurers (here a mutual insurer with a number of substantial foreign members) into burdensome litigation in the United States courts, they may succeed in impairing the value of this vehicle as an alternative to the commercial market to solve the insurance needs of United States—and California—insureds.

Under precedents such as *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), California insureds almost always can obtain jurisdiction over their insurers in California. Two critical elements of *McGee*—an insurer that solicits business from California insureds and a California insured seeking the protection of California law—are missing in this case. O.I.L. has never solicited business in California; it is a Bermuda mutual insurer owned by some thirty-five oil companies, which has written insurance only when the shareholder-insured has come to it in Bermuda to obtain coverage. Further, none of the would-be claimants here is a California insured. The claimants are the CGL insurers of O.I.L.'s Texas-headquartered shareholder-insured, and they are based and doing business worldwide and (in many cases) not even admitted in California.

Moreover, although these CGL insurers are not themselves insureds, the decision of the court below gives them a forum not available to the insured itself. The shareholders-insureds of O.I.L.—American, European and Canadian oil companies

having property and operations located worldwide—have agreed for their collective benefit that any dispute concerning the insurance provided by O.I.L. will be resolved by arbitration in London. Were it otherwise, each might claim the benefit of a quirk of its domestic law. The London arbitration clause is the definitive evidence that O.I.L. and its insureds, including Shell, did not intend that O.I.L. be haled into any other forum. The London arbitration clause is also a fundamental element of O.I.L.'s insurance of Shell, and it is upon that insurance that the cross-claiming commercial insurers premise their claim that their insurance is in excess of that provided by O.I.L.

The Court of Appeal, however, gave the clause short shrift. Having found that by reason of the clause O.I.L. did not anticipate being haled into court in California (3a), the court held that the question was rather whether O.I.L. "reasonably" should have anticipated such a result by reason of its conduct and connection with California (9a). The court later said, cryptically: "Nor can O.I.L.'s forum selection clause ipso facto deprive insureds, beneficiaries, persons insured by the insureds' activities, or other potential plaintiffs of a California forum for suit" (10a). The court, with this considerable circularity, eliminated the clause from its consideration of O.I.L.'s reasonable anticipation.

Taken literally, the decision of the Court of Appeal would allow any insured, including a major commercial entity like Shell, to abrogate its agreement with other business entities (here, the other shareholder-insureds of O.I.L., including several European and Canadian enterprises) that all disputes must be resolved in a given forum by arbitration. Even if the court's reasoning applies only to insureds' other insurers and not to insureds themselves, the practical effect is almost the same; in almost every business insurance dispute there will be numerous insurers on the risk, at least one of which can be expected to accept the invitation of the Court of Appeal to assert a cross-claim against an insurer otherwise entitled to a bargained-for forum selection/arbitration clause. By forcing a

general appearance by O.I.L. here, the Court of Appeal nullified the forum selection/arbitration clause agreed to by O.I.L.'s multi-national shareholder-insureds.

Arbitration and forum selection clauses merit far greater deference in the context of international commerce. As the Court recently reiterated in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3356 (1985), *quoting Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974):

> " 'A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . .
>
> " 'A parochial refusal by the courts of one country to enforce an international arbitration agreement would . . . damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.' "

In the leading case of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), the Court held that "in the light of present-day commercial realities and expanding international trade . . . the forum clause [should be enforced] . . . specifically unless . . . enforcement would be unreasonable and unjust, or . . . the clause was invalid for such reasons as fraud or overreaching."

The Court of Appeal's refusal to honor O.I.L.'s forum selection/arbitration clause thus not only violates O.I.L.'s legitimate—and reasonable—expectation and due process, but also transgresses a strong public policy favoring enforcement of such clauses.

CONCLUSION

The writ of certiorari should issue.

Dated: Oakland, California
May 30, 1986

Respectfully submitted,

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Decision of the Court of Appeal of the State of California, First Appellate District, Division Three, Issuing a Peremptory Writ of Mandate

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

AO32845

(Super Ct. No. 278953 San Mateo County)

A.I.U. INSURANCE COMPANY et al.,
Petitioners,

—v.—

THE SUPERIOR COURT OF SAN MATEO COUNTY,
Respondent,

OIL INSURANCE LIMITED,
Real Party in Interest.

This petition challenges a trial court ruling quashing service of process for insufficient contacts to justify long-arm jurisdiction over a Bermuda insurance company. It raises the question of whether the insurer of very substantial California risks and property may avoid the jurisdiction of California courts by structuring its affairs so that most contacts with the insureds take place outside of the United States. We conclude that the insurer's contacts with California suffice for exercise of jurisdiction by the California courts.

The states of California and Colorado, the United States Environmental Protection Agency and the United States Army are suing Shell Oil Company (Shell) for damages and clean-up costs for pollution of the Rocky Mountain Arsenal in Colorado and of a toxic waste site near Fullerton, California.

Damages of around $2 billion are sought for pollution alleged to have taken place over the last 35 to 40 years, primarily at the Colorado site. Shell has sued some 250 insurance companies in San Mateo County Superior Court, seeking declaratory relief concerning coverage by various primary and excess general liability policies held by Shell and its corporate predecessors. Some of the defendants have cross-complained against Oil Insurance Limited (O.I.L.), a mutual insurance company created by about 35 major oil companies, including Shell. The cross-complainants contend that O.I.L.'s policy, issued in 1976, covers some or all of the damages.

O.I.L., a Bermuda-based company, moved to quash service for lack of personal jurisdiction over the corporation. The motion was granted, leading to this petition for writ of mandate filed on behalf of a number of the cross-complaining insurance companies.

"Where a defendant properly moves to quash out-of-state service for lack of jurisdiction, the burden is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. [Citation.] When the evidence of jurisdictional facts, which may be in the form of declarations, is in conflict the trial court's resolution thereof will not be disturbed if supported by substantial evidence. [Citations.] On review of an order granting a motion to quash, the facts must be viewed most favorably to the defendant. [Citations.]" (*Messerschmidt Development Co.* v. *Crutcher Resources Corp.* (1978) 84 Cal. App. 3d 819, 825.)

For the most part, the facts are not in dispute, most of the operative facts having been provided by stipulation. The facts, viewed most favorably to O.I.L., show that O.I.L. is a mutual insurance company based in and incorporated under the laws of Bermuda. Its sole office is there and its officers and employees are all residents of Bermuda. All of its insurance policies have been issued in Bermuda, and O.I.L.'s shareholders' agreement, pursuant to which the policies are issued, has been signed by each shareholder/policyholder in Bermuda or in another location outside the United States. O.I.L. is not

and has not been taxed by the United States or any state of the United States.

During the formation of O.I.L. in 1972, the five oil company representatives participating in its formation had contact with California. One was a California resident. Others communicated with him by letter and telephone. O.I.L. was created in part because of the reaction of traditional insurers to the Santa Barbara oil spill.

O.I.L.'s shareholders/policyholders are 35 large petroleum companies. In order to obtain insurance, a company must become a shareholder in O.I.L. and agree to the provisions of the shareholders' agreement. The terms of each insurance policy are prescribed by exhibits to the shareholders' agreement. The policies expressly provide that the only means for resolving disputes thereunder is by arbitration in London, applying New York law. In the 13 years of O.I.L.'s existence, no suit concerning a policy claim has ever been brought or threatened in a court in the United States or any foreign country. O.I.L. has not anticipated that it would be haled into court in California.

Three of O.I.L.'s shareholders/policyholders are major oil companies headquartered in California: Atlantic Richfield Company, Chevron Corporation, and Unocal Corporation. O.I.L. has sent copies of its policies of insurance from Bermuda to these shareholders/policyholders in California, and it has received over $145 million in premiums from those three companies since 1972. The insurance policies sent to California were merely convenience copies, not binding contracts.

These California-based oil companies and other shareholders/policyholders of O.I.L. have substantial assets and insure substantial risks in California. However, O.I.L. provides world-wide coverage for its insureds calculated without regard to location of the various assets. Since its creation in 1972, O.I.L. shareholders/policyholders have submitted claims for losses in California totalling over $34 million, and O.I.L. has made payments of over $25 million for such claims. O.I.L. has sent persons from United States affiliates of nonexclusive

agents to California in connection with the adjustment of claims for losses in California. Certain claims payments have been sent by wire transfer to banks located in California, and O.I.L. has received wire transfers of premium payments from one shareholder/policyholder's California bank account. Two members of O.I.L.'s board of directors are residents of California.

Less than 10 percent of O.I.L.'s shareholders/policyholders are headquartered in California, and less than 15 percent of the total premiums received by O.I.L. have been from California shareholders/policyholders. Only 3 of 188 claims made against O.I.L. have involved losses in California (two refinery fires and storm damage to an offshore oil facility).

Were O.I.L.'s Contacts with California Sufficient to Justify Long-Arm Jurisdiction?

By statute, "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc., § 410.10.) Over 40 years ago, the United States Supreme Court explained that the due process clause of the Fourteenth Amendment of the United States Constitution bars the states from entering judgments affecting the rights or interests of a nonresident defendant absent such "minimum contacts" with the state that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (*Internat. Shoe Co.* v. *Washington* (1945) 326 U.S. 310, 316.) In the intervening 40 years, elements of the "minimum contacts" test have been further refined, and the test has been generally liberalized due to the "fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages

in economic activity." (*McGee* v. *International Life Ins. Co.* (1957) 355 U.S. 220, 222-223.)

In spite of liberalization of the "minimum contacts" test, courts have not abandoned all restrictions on suing nonresident defendants. Thus, in *Hanson* v. *Denckla* (1958) 357 U.S. 235, 253, the court held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," and in *World-Wide Volkswagen Corp.* v. *Woodson* (1980) 444 U.S. 286, the court applied the "puposefully avails" standard to exempt from Oklahoma's jurisdiction defendants who had merely placed a Volkswagen in the stream of commerce by selling it in New York knowing that it might be driven in other states. The opinion distinguished a local retailer or distributor from a major manufacturer or distributor who delivered its products into the stream of commerce "with the expectation that they will be purchased by consumers in the forum State." (*Id.* at p. 298.) In the latter case, the manufacturer " 'benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents.' " (*Asahi Metal Industry Co., Ltd.* v. *Superior Court* (1985) 39 Cal.3d 35,45, quoting from *DeJames* v. *Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 285.)

Although there are many decisions applying the "minimum contacts" test to manufactured products (see *Asahi Metal Industry Co., Ltd.* v. *Superior Court*, supra, 39 Cal.3d 35, and cases cited therein), decisions concerning insurance contracts are scarce. In *Travelers Health Assn.* v. *Virginia* (1950) 339 U.S. 643, an early example, the court sustained Virginia's jurisdiction over a Nebraska insurer conducting a mail-order health insurance business. The insurer had signed up 800 Virginia members by encouraging members to recommend the association to friends and submit their names to the home office, and by then mailing solicitations and applications to these prospects. The *Travelers* court found that "where busi-

ness activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state." (*Id.*, at p. 647.) It observed that "[t]he Association did not engage in mere isolated or short-lived transactions. Its insurance certificates, systematically and widely delivered in Virginia following solicitation based on recommendations of Virginians, create continuing obligations between the Association and each of the many certificate holders in the state." (*Id.*, at p. 648.) It based its decision in part upon the observation that "if Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificateholders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska lawsuit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated." (*Id.*, at pp. 648-649.)

McGee v. *International Life Ins. Co.*, *supra*, 355, U.S. 220, demonstrates that an insurance company's contact with the forum state need not be systematic and continuous if the lawsuit arises out of purposeful contact with the state. In *McGee* a California resident had purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. When International Life Insurance Company agreed to assume Empire's insurance obligations it mailed a reinsurance certificate to the insured, offering to insure him in accordance with the terms of the Empire policy. He accepted the offer and from that time until his death paid premiums by mail from his California home to International's Texas office. Neither Empire nor International had any office or agent in California and, on the record before the court, International had never solicited or done any insurance business in California apart from the policy involved therein. Nonetheless, the *McGee* court upheld California's jurisdiction

over International: "Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. [Citations.] The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—here on the company's defense of suicide—will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process." (*Id.*, at pp. 223-224.)

Closer in some ways to this case than *Travelers* or *McGee* is a Third District case almost overlooked by the legal community. In *McClanahan* v. *Trans-America Ins. Co.* (1957) 149 Cal. App. 2d 171, Washington residents who were injured in a Shasta County automobile collision sued Trans-America Insurance Company for failure to pay the judgment recovered against its insureds. Defendant moved to quash, asserting that it was an Alabama corporation not qualified to do business in California, that it had written no insurance policies in the state, had no agents, jobbers or independent contractors who solicit business for it here, and maintained no office or place of business in California. Its only contact with the state was that it insured motorists who sometimes operated their vehicles in California and that under the terms of the policies it was obligated to investigate accidents in this state and employ

attorneys, investigators and adjustors to adjust and negotiate claims, defend actions, and pay judgments arising out of actions against its policyholders in this state.

The policyholders in *McClanahan* were residents of Colombia, South America. After the accident, Trans-America employed an adjustment service agency to investigate the claims, engaged two doctors to examine plaintiff and/or testify at trial, and engaged attorneys to handle the lawsuit. In finding jurisdiction over the Alabama company, the court stated: "It could be said that from the very nature of defendant's business, the insuring of automobile owners, that whenever it issued a policy of automobile insurance, the defendant contemplated that the holder thereof might at some time be a user of the highways of this state, subject to all of the hazards of such use, and hence knew it would be necessary to come into the courts of this state to assert its rights and defend its obligations under such policies . . . . [W]e may note that by the very terms of the policy, it was the defendant insurance company which, upon notice of the accident, for all practical purposes became a real party in interest—it took over the complete control of all aspects of the case from a defense standpoint. In fact, had not the Galloways placed the entire case in defendant's hands to compromise or defend as it saw fit, such action on their part could well have resulted in a breach of the contract of insurance. The activities of the defendant under the circumstances shown cannot be gauged, as did the trial court, on the basis of one lawsuit or one visit by a corporate agent, or the fact that the defendant carried on no solicitation in this state." (*Id.*, at p. 174.)

Although *McClanahan* has rarely been cited and has not been applied by a California court, it has been characterized by a legal commentator as "the furthest extension of jurisdiction based on an isolated contract . . . ." (Comment, *Developments in the Law, State-Court Jurisdiction* (1960) 73 Harv.L.Rev. 911, 928.) Witkin reads *McClanahan* to suggest that an automobile insurance company is a "special type of foreign corporation [that] necessarily does business in all the

states, and cannot avoid jurisdiction . . . ." (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 121, p. 498.)

None of these insurance cases precisely mirrors O.I.L.'s contact with California, but each provides some insight into the considerations affecting the decision in this case. Many of the reasons for holding the out-of-state insurers subject to jurisdiction in *Travelers*, *McGee* and *McClanahan* apply equally to jurisdiction over the insurer for an oil company with significant assets and activities in California.

Before considering the specific contacts of O.I.L. with California, we note that "[a] distinction is made between a cause of action arising out of or in connection with a nonresident defendant's forum-related economic activity and a cause of action entirely distinct from that activity. When the cause of action *arises out of the forum-related economic activity*, the forum state will entertain jurisdiction over the nonresident defendant. An isolated act of economic activity, such as the making and performance of a contract in the forum state, may be sufficient to accord the forum state jurisdiction over the defendant when the cause of action is related to that isolated act of economic activity. [Citations.] Where, however, the cause of action is *entirely distinct from the forum-related economic activity*, the defendant cannot be sued in the forum state unless that economic activity has reached '. . . such extensive or wide-ranging proportions as to make the defendant sufficiently "present" in the forum state . . .' to support jurisdiction over him. [Citations.]" (*Sanders* v. *CEG Corp.*, (1979) 95 Cal.App.3d 779, 784.)

Here, the cause of action asserted against O.I.L. arises in part out of its forum-related activities—insurance of Sheli's assets and activities in California. Thus, the economic activity in California need not be extensive or wide-ranging.

Relying upon *Worldwide Volkswagen Corp.* v. *Woodson*, *supra*, and noting the forum-selection clause in its insurance contracts, O.I.L. argues that it did not anticipate being sued in California. But the question is not what O.I.L. *did* anticipate, but what it *reasonably should have* anticipated. Were the

"defendant's conduct and connection with the forum State [ ] such that he should reasonably anticipate being haled into court there[?] [Citations.]" (444 U.S. at p. 297.)

Comparing O.I.L.'s contacts with those of insurers in *McGee* and *McClanahan*, it is apparent that jurisdiction over O.I.L. is warranted. In *McGee* the insurer's only contact with California was an insurance contract sent to a California resident, followed by the insured's payment of premiums. Here, the insurer has insured three major California-based oil companies and the California operations of numerous other companies. It has received over $145 million in premiums from the California companies and has made payments of over $25 million for California losses. The mere device of entering these contracts in Bermuda rather than mailing the agreements to the insureds cannot insulate O.I.L. from the impact of these activities upon California. Nor can O.I.L.'s forum selection clause ipso facto deprive insureds, beneficiaries, persons injured by the insureds' activities, or other potential plaintiffs of a California forum for suit. An insurer who derives such significant economic benefit from insuring California assets and activities must expect correlative burdens.

O.I.L.'s position is much like that of the insurer in *McClanahan*—it issued insurance with world-wide coverage and could reasonably have anticipated California losses. In fact, O.I.L. had much greater reason to expect California losses because it insured stationary assets and activities located in California. It is true that O.I.L. made no agreement with the insureds to investigate and defend actions wherever they arose, as had the insurer in *McClanahan*. However, when losses have taken place in California, O.I.L. has asked adjustors to come to this state to investigate and negotiate, as any reasonable insurer would be expected to do. The mere fact that the contract did not oblige O.I.L. to send investigators or employ attorneys to defend actions in California does not make California's jurisdiction over O.I.L. unreasonable.

We conclude that the trial court erred in quashing service of process upon O.I.L. Let a peremptory writ of mandate issue directing the San Mateo County Superior Court to vacate its order granting O.I.L.'s motion to quash.[1]

CERTIFIED FOR PUBLICATION

Scott, J.

We concur:

White, P.J.

Merrill, J.

Filed: February 6, 1986

1 An order granting a motion to quash is appealable. (Code Civ. Proc., § 904.1, subd. (c).) However, under the circumstances of this case, appeal is not an adequate remedy. The court did not merely grant O.I.L.'s motion to quash. It also stayed Shell's action against the 250 insurance companies because of O.I.L.'s absence. The writ we issue will place the case back on the track and render moot Shell's pending writ petition challenging the trial court's stay order. (*Shell Oil Company* v. *Superior Court*, A032788.)

Decision of the Court of Appeal of the State of California, First Appellate District, Division Three, Denying O.I.L.'s Petition for Rehearing

COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT DIVISION THREE

A.I.U. INSURANCE COMPANY, ET. AL

—v.—

SUPERIOR COURT COUNTY OF SAN MATEO
OIL INSURANCE LIMITED

A032845

San Mateo County No. 278953

BY THE COURT:

The petition for rehearing is denied.

Dated: March 5, 1986

White, P.J.

Order of the Supreme Court of the State of California Denying O.I.L.'s Petition for Review.

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL 1ST DISTRICT, DIVISION 3, No. A032845

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

A.I.U. INSURANCE COMPANY ET AL.,
Petitioners,

—v.—

SUPERIOR COURT OF THE COUNTY OF SAN MATEO,
Respondent;

OIL INSURANCE LIMITED,
Real Party in Interest.

Petition for review of Real Party in Interest DENIED.

Bird

Chief Justice

[File-stamped
May 21, 1986]

Decision of the Superior Court, County of San Mateo, Granting O.I.L.'s Motion to Quash Service of Process

SUPERIOR COURT, STATE OF CALIFORNIA,

COUNTY OF SAN MATEO

PRESENT: Hon. WILLIAM LANAM, *Judge of the Superior Court*

No. 278953, *Shell Oil Company* v. *Accident & Casualty Insurance Co. of Winterthur et al.*

Motion of Plaintiff for reconsideration and Modification of the Court's Order staying further proceedings

(May 9)

Michael R. Nave (Ptf)
Thorn Rosenthal (Ptf)
William S. Boyd (Ptf)
Barry L. Bunshoft (Deft.)
(list of other attys present attached.)

Submitted May 9, 1985

MEMORANDUM DECISION

The Court has once again reviewed the exhaustive memoranda, so graciously provided by various counsel in the above proceedings, and continues to conclude that without the involvement of O.I.L. this Court will not be able to render either complete or adequate relief and the action shall not proceed. As indicated in its earlier order, if O.I.L. is unwilling to voluntarily submit to the jurisdiction of the Court, then Shell should proceed by way of its contractual arbitration prior to continuation of the present proceedings.

Further clarification of this Court's prior order appears necessary and in order that all issues might be resolved, the

Court does conclude that it does not have personal jurisdiction over O.I.L. and that the motion to dismiss the cross-complaints against said corporation are granted. In support of said conclusion, the Court does find that it cannot ignore the London Form selection/arbitration clause in the agreement between Shell and O.I.L., and that the documents and stipulations presented during the course of the proceedings do not support or provide a basis for finding "minimum contacts." It was thought that the above findings were implicit in the earlier rulings by the Court setting forth the stay. However, questions remained and the issue had to be met to facilitate any desired appellate review. The Court does amend its prior order to include a dismissal of the cross-complaints against O.I.L.

Defendant's request for attorneys fees under Section 128.5 is denied.

Attorneys for plaintiff shall prepare an order consistent with the findings and orders of this Court.

Dated: August 8, 1985

/s/ WILLIAM LANAM

William Lanam

Judge Of The Superior Court

Order of the Superior Court, County of San Mateo, Granting O.I.L.'s Motion to Quash Service of Process

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

No. 278953

SHELL OIL COMPANY,

Plaintiff,

—v.—

ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR, et al.,

Defendants.

Order Staying Proceedings and Granting Motion to Dismiss Cross-Complaint Against O.I.L. Ltd.

This Court having reviewed the memoranda submitted on Shell's motion for reconsideration and the Court having heard the arguments of counsel at the hearing thereon on May 9, 1985, and,

This Court having concluded in its decision dated August 8, 1985 that without the involvement of O.I.L. this Court will not be able to render either complete or adequate relief and the action should not proceed,

IT IS ORDERED that:

1. All present proceedings are stayed pending either the submission by O.I.L. to the jurisdiction of this Court in the present proceedings or completion of London arbitration proceedings between Shell and O.I.L.; and

2. The cross-complaints against O.I.L. are dismissed because of the presence of the London forum selection/arbitration clause in the agreement between Shell and O.I.L. and because of the absence of minimum contracts between O.I.L. and California sufficient to establish personal jurisdiction over O.I.L.

DATED: September 17, 1985

/s/ WILLIAM LANAM
William Lanam
Judge of the Superior Court

No. 85-1977

In the Supreme Court
OF THE
United States

October Term, 1985

Supreme Court, U.S.
FILED
JUN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

OIL INSURANCE LIMITED,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,
and
A.I.U. INSURANCE COMPANY, AMERICAN HOME INSURANCE COMPANY, BIRMINGHAM INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FROUDE AND COMPANIES, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MISSION INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, SUN INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

A. May an insurance company with extensive contacts with California avoid that state's exercise of jurisdiction because it was deliberately established to appear to be doing business only in Bermuda?

B. May an arbitration clause in a contract between an insurer and an insured be enforced to deprive third parties of a forum for resolution of disputes between such third parties and the insurer?

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No. 85-1977

In the Supreme Court

OF THE

United States

October Term, 1985

OIL INSURANCE LIMITED,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,

and

A.I.U. INSURANCE COMPANY, AMERICAN HOME INSURANCE COMPANY, BIRMINGHAM INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FROUDE AND COMPANIES, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MISSION INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, SUN INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Respondents A.I.U. Insurance Company, et al., (the "Interested Defendants") pray that the Petition for Writ

of Certiorari be denied and that no review be granted of the decision of the Court of Appeal of the State of California, First Appellate District, Division Three, entered in this proceeding on February 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three ("the Court of Appeal"), issuing a peremptory writ of mandate ordering the respondent Superior Court in and for San Mateo County ("the Superior Court") to vacate its order quashing service of process upon Oil Insurance Limited, ("O.I.L.") is reported at 177 Cal. App. 3d 381, 222 Cal. Rptr. 880 ("the Decision"). The Decision is set forth in the Appendix to this Opposition Brief at 1a-13a. The Court of Appeal's unreported opinion denying rehearing is set forth at 14a, and the order of the California Supreme Court denying O.I.L.'s petition for review is set forth at 15a.

STATEMENT OF THE CASE

Shell Oil Company ("Shell") has been sued by governmental agencies and others for clean-up costs of dump sites Shell has been accused of polluting with toxic chemicals. The dump sites are located in Fullerton, California and Denver, Colorado, and the estimated cost of cleaning them exceeds two billion dollars. In October 1983, Shell filed a declaratory relief action in the Superior Court against some 250 of its comprehensive general liability insurance carriers from 1942 to the present. Shell alleges that the policies provide coverage for indemnification and defense costs.

The only insurance company which Shell did not sue was its own captive insurer, O.I.L., which has provided

Shell with comprehensive general liability coverage since 1976. Every insurance policy issued to Shell excludes coverage for pollution, with one exception: the O.I.L. policies issued to Shell expressly cover liability arising from pollution.

In the Petition, O.I.L. sets forth an understandably narrow interpretation of its policies, in an effort to explain Shell's selective omission of O.I.L. from the declaratory relief action. The actual reason, however, is that O.I.L. is a captive in large part of Shell. Recovery from Shell would require contribution to O.I.L. by Shell, a result which Shell would naturally prefer to avoid.

The Interested Defendants cross-complained against O.I.L., and seek a declaration that any coverage provided by them is in excess to that of O.I.L., i.e., such coverage is inapplicable until the limits of the O.I.L. policies are exhausted. O.I.L. moved to quash service. Shell (represented by the same attorneys who represent O.I.L.) submitted papers in support of O.I.L.'s motion. The Superior Court granted the motion, but the Court of Appeal, in a unanimous and well-reasoned decision, reversed the order. O.I.L.'s subsequent Petitions for Rehearing and Petition for Review to the California Supreme Court were also unanimously denied.

SUMMARY OF ARGUMENT

The Court of Appeal correctly determined that O.I.L. has sufficient minimum contacts with California to warrant the exercise of jurisdiction.

O.I.L. proffers two reasons for the grant of certiorari. First, O.I.L. contends that this Court's disposition of *Asahi Metal Industry Co. v. Superior Court,* 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985) *cert. granted,* 106 S. Ct. 1258 (1986) (*"Asahi"*) will require reversal of the

Decision. Second, O.I.L. argues that a clause in the insurance contracts which provides for arbitration of disputes between O.I.L. and Shell precludes exercise of jurisdiction in an action against O.I.L. by any person not a party to the insurance contract. Neither argument meets the standards of this Court's Rule 17, and a writ of certiorari should not issue.

REASONS FOR DENYING THE WRIT

I

O.I.L. HAS MORE THAN MINIMUM CONTACTS WITH CALIFORNIA, AND THE EXERCISE OF JURISDICTION WAS PROPER.

The undisputed facts before the Court of Appeal included the following.[1] O.I.L. is an insurance company which provides commercial insurance for 34 insureds, each of which, like Shell, is a large petroleum company. O.I.L.'s policies cover risks located worldwide. The California based insured-owners of O.I.L., which control approximately 16% of O.I.L.'s voting shares, are three of the largest oil companies in the world: Atlantic Richfield Company, Chevron Corporation and Unocal Corporation (formerly Union Oil). Since its creation in 1972, O.I.L. has issued and sent insurance policies to these three owner-insureds in California. Many of O.I.L.'s owner-insureds, including Shell, have substantial assets and operations in California which are covered under O.I.L. policies.

The extent of O.I.L.'s economic activity within California has been enormous. Since 1972, O.I.L. has been paid

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[1]The references in this section are supported by the Decision or the Supplemental Affidavit of Charles Bailey, President of O.I.L., submitted in support of O.I.L.'s motion to quash.

the staggering total of $145,314,658 in premiums directly from its California headquartered owner-insureds (an average of over $11,000,000 in annual premium income). O.I.L. has also received $38,000,000 in reinsurance premiums from the captive insurer of Occidental Petroleum Company, a California company. Thus, since 1972, O.I.L. has collected gross revenues in the form of insurance and reinsurance premiums of approximately $186,000,000 directly or indirectly from California corporations. Since O.I.L.'s premium revenue is slightly in excess of one billion dollars, the premiums paid directly or indirectly by California corporations constitute almost 20% of the total premiums received by O.I.L.

O.I.L. has also paid substantial amounts for California based losses. Since 1972, O.I.L.'s owner-insureds have submitted claims for losses occurring in California aggregating $34,681,000 and O.I.L. has made payments for such claims in the amount of $25,681,000. O.I.L. sent agents to California in connection with the adjustment of claims for such losses as a part of the normal course of its insurance business.

Most of these facts were stipulated and they clearly demonstrate that O.I.L. has had more than sufficient minimum contracts with California to support the exercise of jurisdiction over O.I.L.

II

THIS COURT'S GRANT OF CERTIORARI AND DISPOSITION OF ASAHI HAS NO BEARING ON THE CASE AT BAR, AS THE DECISION IN THE COURT BELOW WAS NOT BASED OR PREMISED UPON ASAHI BUT ON FACTUALLY SIMILAR INSURANCE CONTRACT CASES

O.I.L. argues that the Decision is based or premised upon *Asahi*, and that *Asahi's* reversal would *"a fortiori"* mandate reversal of the Decision. The argument is wholly unsupported, and in fact the Court of Appeal did not "rely" on *Asahi* and only mentioned it twice. The Decision first referred to *Asahi* for the limited purpose of citing *Asahi's* quote from a federal court decision interpreting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). The passage from the Decision stated, after quoting from *World-Wide Volkswagen:*

> "In the latter case, the manufacturer " 'benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents.' " *(Asahi Metal Industry Co., Ltd. v. Superior Court* (1985) 39 Cal. 3d 35, 45 quoting from *De James v. Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 285.)"

The Decision then noted that while there is an abundance of jurisdictional cases in the products liability context such as *Asahi,* cases applying the minimum contacts test to insurance cases are comparatively scarce. These two oblique references to *Asahi* constituted the sum total of the Court of Appeal's mention (let alone "reliance") upon *Asahi.*

Asahi involved facts and law entirely different than in the present case. In *Asahi,* a defendant in a products liability case cross-complained against a Japanese manu-

facturer which made no direct sales in California. *Asahi* turned on an analysis of cases such as *World Wide Volkswagen, supra,* in which manufacturers deliver their products into the stream of commerce. The Court of Appeal did not analyze or apply the principles set forth in *Asahi* and instead discussed at length three insurance contract jurisdiction cases: *Travelers Health Assn. v. Virginia* 339 U.S. 643 (1950); *McGee v. International Life Ins. Co.* 355 U.S. 220 (1967); and *McClanahan v. Trans-America Ins. Co.* 149 Cal. App. 2d 171 (1957).

In *Travelers,* a Nebraska mail-order health insurer wrote policies to Virginia insureds. This Court upheld Virginia's exercise of jurisdiction, although there were no actual transactions within the state, in part because the issuance and delivery of insurance certificates created "continuing obligations" between the company and the insured.

In *McGee,* this Court held that a nonresident insurance company's contact with the forum state need not be systematic and continuous so long as it amounts to "purposeful contact" with the state. In *McClanahan,* the court held that the act of insuring motorists who sometimes operated their vehicles in California was sufficient economic presence to warrant jurisdiction, even though the lawsuit was not instituted by the insured.

Both *Travelers'* "continuing obligations" and *McGee's* "purposeful contact" turned on the facts that insurers drew premiums from the forum states, sent adjustors to investigate claims there, and knew the forum states to be the likely residence of witnesses to accidents. The Court of Appeal recognized that the same facts exist in the present case, as O.I.L. has collected $145 million in premiums from California, and has sent investigators there to settle large claims.

The Court of Appeal considered the principles of these three cases to apply to "the insurer for an oil company with significant assets and activities in California". In response to O.I.L.'s argument that it did not expect to be haled into court in California, the Court of Appeal correctly observed that the pertinent issue was not O.I.L.'s subjective anticipation, but what it reasonably should have anticipated. The Court held:

> "Comparing O.I.L.'s contacts with those of insurers of *McGee* and *McClanahan,* it is apparent that jurisdiction over O.I.L. is warranted. In *McGee* the insurer's only contact with California was an insurance contract sent to a California resident, followed by the insured's payment of premiums. Here the insurer has insured three major California-based oil companies and the California operations of numerous other companies. It has received over $145 million in premiums from the California companies and has made payments of over $25 million for California losses. The mere device of entering these contracts in Bermuda rather than mailing the agreements to the insureds cannot insulate O.I.L. from the impact of these activities upon California."

The Court of Appeal concluded that O.I.L.'s contacts with California were even stronger than those in *McClanahan* because O.I.L. insures stationary assets and activities located in the state, and has greater reason to expect California losses.

The Decision is also consistent with and supported by recent federal authority. In *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.,* 784 F.2d 1392 (9th Cir. 1986), a group of physicians established a self-funding indemnity insurance company (the "Fund") in the Cayman Islands. The Fund was incorporated in the Cayman Islands, and its sole office was maintained there. All

directors' meetings, all transactions and communications, the issuance and delivery of insurance policies and the payment of premiums were conducted in the Cayman Islands. The insurance contract provided that it would be governed by Cayman Island law, and disputes between the insured and the Fund were to be resolved through binding arbitration. Even so, the Court held that, under California law, it is not necessary for a transaction physically to take place in California to meet the minimum contacts requirement:

> "Thus, despite the formal manner in which the transactions between the Fund and its insureds were conducted, as a matter of commercial actuality and of placing substance over form, we find that the Fund's outside activity was 'purposefully directed' to a participation in the California insurance market."

Id. at 1398.

The Court of Appeal relied upon well-settled authority to support the Decision, and *Asahi* was not a significant basis of the Decision. The Interested Defendants therefore submit that the disposition of *Asahi* will have no effect on the Decision and provides no grounds to support the Petition.

III

THE ARBITRATION CLAUSE ISSUE IS NOT A JUSTICIABLE CONTROVERSY FOR REVIEW BECAUSE IT RAISES NO SIGNIFICANT QUESTION OF DUE PROCESS AND PRESENTS NO CONFLICT IN STATE OR FEDERAL LAW.

O.I.L. argues that an arbitration clause in the O.I.L.-Shell insurance contract should prevent the Interested Defendants from maintaining an action against O.I.L. in California. The Decision held that the arbitration provi-

sion in the Shell-O.I.L. contract cannot be permitted *ipso facto* to "deprive insureds, beneficiaries, persons injured by the injureds' activities, or other potential plaintiffs of a California forum for suit."

O.I.L. proffers no reason for review of this aspect of the Decision, and does not cite a single case where a non-party to a contract is bound by the provisions of the agreement. O.I.L. refers to an insurance "crisis" but offers no demonstration that the purported crisis will be abated if off-shore captive insurers such as O.I.L. can avoid the courts of American states where their insureds transact business.

As this Court is well aware, considerations governing review of state court rulings provide that certiorari is proper:

> "(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." (Sup. Ct. R. 17)

O.I.L. has not shown the Decision to be in conflict with the decision of another state court of last resort or of a federal court of appeals. In fact, the Decision is consistent with the latest Ninth Circuit case addressing the issue, *Haisten, supra.*

O.I.L. argues that "arbitration and forum selection clauses merit far greater deference in the context of international commerce". Of course, the fact that companies of diverse countries are involved confers no talis-

manic significance that either binds nonparties to an agreement or insulates a company with the requisite minimum contacts from jurisdiction. O.I.L.'s references to "international commerce" are to admirable notions, but they obviously have no application here.

O.I.L.'s novel theory that an arbitration clause in an agreement between an insured and its insurer determines jurisdiction for all possible litigants is completely unsupported by statutory or decisional law. The Court of Appeal fully considered and correctly decided the matter; O.I.L.'s arguments are without merit.

CONCLUSION

The writ of certiorari should not issue.

Dated: June 27, 1986
Los Angeles, California

Respectfully submitted,

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Decision of the Court of Appeal of the State of California, First Appellate District, Division Three, Issuing a Peremptory Writ of Mandate

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

First Appellate District, Division Three

A032845

(Super Ct. No. 278953 San Mateo County)

A.I.U. INSURANCE COMPANY et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN MATEO COUNTY,

Respondent,

OIL INSURANCE LIMITED,

Real Party in Interest.

This petition challenges a trial court ruling quashing service of process for insufficient contacts to justify long-arm jurisdiction over a Bermuda insurance company. It raises the question of whether the insurer of very substantial California risks and property may avoid the jurisdiction of California courts by structuring its affairs so that most contacts with the insureds take place outside of the United States. We conclude that the insurer's contacts with California suffice for exercise of jurisdiction by the California courts.

The states of California and Colorado, the United States Environmental Protection Agency and the United States Army are suing Shell Oil Company (Shell) for damages and clean-up costs for pollution of the Rocky Mountain Arsenal in Colorado and of a toxic waste site near Fullerton, California. Damages of around $2 billion are sought for pollution alleged to have taken place over the last 35 to 40 years, primarily at the Colorado site. Shell has sued some 250 insurance companies in San Mateo County Superior Court, seeking declaratory relief concerning coverage by various primary and excess general liability policies held by Shell and its corporate predecessors. Some of the defendants have cross-complained against Oil Insurance Limited (O.I.L.), a mutual insurance company created by about 35 major oil companies, including Shell. The cross-complaints contend that O.I.L.'s policy, issued in 1976, covers some or all of the damages.

O.I.L., a Bermuda-based company, moved to quash service for lack of personal jurisdiction over the corporation. The motion was granted, leading to this petition for writ of mandate filed on behalf of a number of the cross-complaining insurance companies.

"Where a defendant properly moves to quash out-of-state service for lack of jurisdiction, the burden is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. [Citation.] When the evidence of jurisdictional facts, which may be in the form of declarations, is in conflict the trial court's resolution thereof will not be disturbed if supported by substantial evidence. [Citations.] On review of an order granting a motion to quash, the facts must be viewed most favorably to the defendant. [Citations.]" (*Messerschmidt Development Co.* v. *Crutcher Resources Corp.* (1978) 84 Cal. App. 3d 819, 825.)

For the most part, the facts are not in dispute, most of the operative facts having been provided by stipulation. The facts, viewed most favorably to O.I.L., show that O.I.L. is a mutual insurance company based in and incorporated under the laws of Bermuda. Its sole office is there and its officers and employees are all residents of Bermuda. All of its insurance policies have been issued in Bermuda, and O.I.L.'s shareholders' agreement, pursuant to which the policies are issued, has been signed by each shareholder/policyholder in Bermuda or in another location outside the United States. O.I.L. is not and has not been taxed by the United States or any state or any state of the United States.

During the formation of O.I.L. in 1972, the five oil company representatives participating in its formation had contact with California. One was a California resident. Others communicated with him by letter and telephone. O.I.L. was created in part because of the reaction of traditional insurers to the Santa Barbara oil spill.

O.I.L.'s shareholders/policyholders are 35 large petroleum companies. In order to obtain insurance, a company must become a shareholder in O.I.L. and agree to the provisions of the shareholders' agreement. The terms of each insurance policy are prescribed by exhibits to the shareholders' agreement. The policies expressly provide that the only means for resolving disputes thereunder is by arbitration in London, applying New York law. In the 13 years of O.I.L.'s existence, no suit concerning a policy claim has ever been brought or threatened in a court in the United States or any foreign country. O.I.L. had not anticipated that it would be haled into court in California.

Three of O.I.L.'s shareholders/policyholders are major oil companies headquartered in California: Atlantic Richfield Company, Chevron Corporation, and Unocal Corporation. O.I.L. has sent copies of its policies of insurance

from Bermuda to these shareholders/policyholders in California, and it has received over $145 million in premiums from those three companies since 1972. The insurance policies sent to California were merely convenience copies, not binding contracts.

These California-based oil companies and other shareholders/policyholders of O.I.L. have substantial assets and insure substantial risks in California. However, O.I.L. provides world-wide coverage for its insureds calculated without regard to location of the various assets. Since its creation in 1972, O.I.L. shareholders/policyholders have submitted claims for losses in California totalling over $34 million, and O.I.L. has made payments of over $25 million for such claims. O.I.L. has sent persons from United States affiliates of nonexclusive agents to California in connection with the adjustment of claims for losses in California. Certain claims payments have been sent by wire transfer to banks located in California, and O.I.L. has received wire transfers of premium payments from one shareholder/policyholder's California bank account. Two members of O.I.L.'s board of directors are residents of California.

Less than 10 percent of O.I.L.'s shareholders/policyholders are headquartered in California, and less than 15 percent of the total premiums received by O.I.L. have been from California shareholders/policyholders. Only 3 of 188 claims made against O.I.L. have involved losses in California (two refinery fires and storm damage to an offshore oil facility).

Were O.I.L.'s Contacts with California Sufficient to Justify Long-Arm Jurisdiction?

By statute, "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ.

Proc., § 410.10.) Over 40 years ago, the United States Supreme Court explained that the due process clause of the Fourteenth Amendment of the United States Constitution bars the states from entering judgments affecting the rights or interests of a nonresident defendant absent such "minimum contacts" with the state that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.) In the intervening 40 years, elements of the "minimum contacts" test have been further refined, and the test has been generally liberalized due to the "fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (*McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 222-223.)

In spite of liberalization of the "minimum contacts" test, courts have not abandoned all restrictions on suing nonresident defendants. Thus, in *Hanson* v. *Denckla* (1958) 357 U.S. 235, 253, the court held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," and in *World-Wide Volkswagen Corp.* v. *Woodson* (1980) 444 U.S. 286, the court applied the "puposefully avails" standard to exempt from Oklahoma's jurisdiction defendants who had merely placed a Volkswagen in the stream of commerce by selling it in New York knowing that it might be driven in other states. The opinion distinguished a local

retailer or distributor from a major manufacturer or distributor who delivered its products into the stream of commerce "with the expectation that they will be purchased by consumers in the forum State." (*Id.* at p. 298.) In the latter case, the manufacturer "'benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents.'" (*Asahi Metal Industry Co., Ltd.* v. *Superior Court* (1985) 39 Cal.3d 35,45, quoting from *DeJames* v. *Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 285.)

Although there are many decisions applying the "minimum contacts" test to manufactured products (see *Asahi Metal Industry Co., Ltd.* v. *Superior Court,* supra, 39 Cal.3d 35, and cases cited therein), decisions concerning insurance contracts are scarce. In *Travelers Health Assn.* v. *Virginia* (1950) 339 U.S. 643, an early example, the court sustained Virginia's jurisdiction over a Nebraska insurer conducting a mail-order health insurance business. The insurer had signed up 800 Virginia members by encouraging members to recommend the association to friends and submit their names to the home office, and by then mailing solicitations and applications to these prospects. The *Travelers* court found the "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state." (*Id.,* at p. 647.) It observed that "[t]he Association did not engage in mere isolated or short-lived transactions. Its insurance certificates, systematically and widely delivered in Virginia following solicitation based on recommendations of Virginians, create continuing obligations between the Association and each of the many certificate holders in the state." (*Id.,* at p. 648.) It based its decision in part upon the observation that "if

Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificateholders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska lawsuit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated." (*Id.*, at pp. 648-649.)

McGee v. *International Life Ins. Co., supra,* 355, U.S. 220, demonstrates that an insurance company's contact with the forum state need not be systematic and continuous if the lawsuit arises out of purposeful contact with the state. In *McGee* a California resident had purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. When International Life Insurance Company agreed to assume Empire's insurance obligations it mailed a reinsurance certificate to the insured, offering to insure him in accordance with the terms of the Empire policy. He accepted the offer and from that time until his death paid premiums by mail from his California home to International's Texas office. Neither Empire nor International had any office or agent in California and, on the record before the court, International had never solicited or done any insurance business in California apart from the policy involved therein. Nonetheless, the *McGee* court upheld California's jurisdiction over International: "Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. [Citations.] The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State

when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof. Often the crucial witnesses — here on the company's defense of suicide — will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but cetainly nothing which amounts to a denial of due process." (*Id.,* at pp. 223-224.)

Closer in some ways to this case than *Travelers* or *McGee* is a Third District case almost overlooked by the legal community. In *McClanahan* v. *Trans-America Ins. Co.* (1957) 149 Cal. App. 2d 171, Washington residents who were injured in a Shasta County automobile collision sued Trans-America Insurance Company for failure to pay the judgment recovered against its insureds. Defendant moved to quash, asserting that it was an Alabama corporation not qualified to do business in California, that it had written no insurance policies in the state, had no agents, jobbers or independent contractors who solicit business for it here, and maintained no office or place of business in California. Its only contact with the state was that it insured motorists who sometimes operated their vehicles in California and that under the terms of the policies it was obligated to investigate accidents in this state and employ attorneys, investigators and adjustors to adjust and negotiate claims, defend actions, and pay judgments arising out of actions against its policyholders in this state.

The policyholders in *McClanahan* were residents of Colombia, South America. After the accident, Trans-America employed an adjustment service agency to investigate the claims, engaged two doctors to examine plaintiff and/or testify at trial, and engaged attorneys to handle the lawsuit. In finding jurisdiction over the Alabama company, the court stated: "It could be said that from the very nature of defendant's business, the insuring of automobile owners, that whenever it issued a policy of automobile insurance, the defendant contemplated that the holder thereof might at some time be a user of the highways of this state, subject to all of the hazards of such use, and hence knew it would be necessary to come into the courts of this state to assert its rights and defend its obligations under such policies. . . . [W]e may note that by the very terms of the policy, it was the defendant insurance company which, upon notice of the accident, for all practical purposes became a real party in interest — it took over the complete control of all aspects of the case from a defense standpoint. In fact, had not the Galloways placed the entire case in defendant's hands to compromise or defend as it saw fit, such action on their part could well have resulted in a breach of the contract of insurance. The activities of the defendant under the circumstances shown cannot be gauged, as did the trial court, on the basis of one lawsuit or one visit by a corporate agent, or the fact that the defendant carried on no solicitation in this state." (*Id.*, at p. 174.)

Although *McClanahan* has rarely been cited and has not been applied by a California court, it has been characterized by a legal commentator as "the furthest extension of jurisdiction based on an isolated contract. . . ." (Comment, *Developments in the Law, State-Court Jurisdiction* (1960) 73 Harv.L.Rev. 911, 928.) Witkin reads *McClanahan* to suggest that an automobile insurance company is a "special type of foreign corporation [that] necessarily

does business in all the states, and cannot avoid jurisdiction . . . ." (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 121, p. 498.)

None of these insurance cases precisely mirrors O.I.L.'s contact with California, but each provides some insight into the considerations affecting the decision in this case. Many of the reasons for holding the out-of-state insurers subject to jurisdiction in *Travelers, McGee* and *McClanahan* apply equally to jurisdiction over the insurer for an oil company with significant assets and activities in California.

Before considering the specific contacts of O.I.L. with California, we note that "[a] distinction is made between a cause of action arising out of or in connection with a nonresident defendant's forum-related economic activity and a cause of action entirely distinct from that activity. When the cause of action *arises out of the forum-related economic activity*, the forum state will entertain jurisdiction over the nonresident defendant. An isolated act of economic activity, such as the making and performance of a contract in the forum state, may be sufficient to accord the forum state jurisdiction over the defendant when the cause of action is related to that isolated act of economic activity. [Citations.] Where, however, the cause of action is *entirely distinct from the forum-related economic activity*, the defendant cannot be sued in the forum state unless that economic activity has reached '. . . such extensive or wide-ranging proportions as to make the defendant sufficiently "present" in the forum state . . .' to support jurisdiction over him. [Citations.]" (*Sanders* v. *CEG Corp.*, (1979) 95 Cal.App.3d 779, 784.)

Here, the cause of action asserted against O.I.L. arises in part out of its forum-related activities — insurance of Shell's assets and activities in California. Thus, the eco-

nomic activity in California need not be extensive or wide-ranging.

Relying upon *Worldwide Volkswagen Corp.* v. *Woodson*, *supra*, and noting the forum-selection clause in its insurance contracts, O.I.L. argues that it did not anticipate being sued in California. But the question is not what O.I.L. *did* anticipate, but what it *reasonably should have* anticipated. Were the "defendant's conduct and connection with the forum State [ ] such that he should reasonably anticipate being haled into court there[?] [Citations.]" (444 U.S. at p. 297.)

Comparing O.I.L.'s contacts with those of insurers in *McGee* and *McClanahan*, it is apparent that jurisdiction over O.I.L. is warranted. In *McGee* the insurer's only contact with California was an insurance contract sent to a California resident, followed by the insured's payment of premiums. Here, the insurer has insured three major California-based oil companies and the California operations of numerous other companies. It has received over $145 million in premiums from the California companies and has made payments of over $25 million for California losses. The mere device of entering these contracts in Bermuda rather than mailing the agreements to the insureds cannot insulate O.I.L. from the impact of these activities upon California. Nor can O.I.L.'s forum selection clause ipso facto deprive insureds, beneficiaries, persons injured by the insureds' activities, or other potential plaintiffs of a California forum for suit. An insurer who derives such significant economic benefit from insuring California assets and activities must expect correlative burdens.

O.I.L.'s posititon is much like that of the insurer in *McClanahan* — it issued insurance with world-wide coverage and could reasonably have anticipated California losses. In fact, O.I.L. has much greater reason to expect

California losses because it insured stationary assets and activities located in California. It is true that O.I.L. made no agreement with the insureds to investigate and defend actions wherever they arose, as had the insurer in *McClanahan*. However, when losses have taken place in California, O.I.L. has asked adjustors to come to this state to investigate and negotiate, as any reasonable insurer would be expected to do. The mere fact that the contract did not oblige O.I.L. to send investigators or employ attorneys to defend actions in California does not make California's jurisdiction over O.I.L. unreasonable.

We conclude that the trial court erred in quashing service of process upon O.I.L. Let a peremptory writ of mandate issue directing the San Mateo County Superior Court to vacate its order granting O.I.L.'s motion to quash.[1]

---

[1]An order granting a motion quash is appealable. (Code Civ. Proc., § 904.1, subd. (c).) However, under the circumstances of this case, appeal is not an adequate remedy. The court did not merely grant O.I.L.'s motion to quash. It also stayed Shell's action against the 250 insurance companies because of O.I.L.'s absence. The writ we issue will place the case back on the track and render moot Shell's pending writ petition challenging the trial court's stay order. (*Shell Oil Company* v. *Superior Court*, A032788.)

CERTIFIED FOR PUBLICATION

_____

Scott, J.

We concur:

_____

White, P.J.

_____

Merrill, J.

Filed: February 6, 1986

Decision of the Court of Appeal of
the State of California,
First Appellate District, Division Three,
Denying O.I.L.'s Petition for Rehearing

COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT DIVISION THREE

A.I.U. INSURANCE COMPANY, ET. AL

— V. —

SUPERIOR COURT COUNTY OF SAN MATEO
OIL INSURANCE LIMITED

A032845

San Mateo County No. 278953

BY THE COURT:

The petition for rehearing is denied.

Dated: March 5, 1986

White, P.J.

Order of the Supreme Court of the State of California
Denying
O.I.L.'s Petition for Review.

ORDER DENYING REVIEW AFTER JUDGMENT
BY THE
COURT OF APPEAL 1ST DISTRICT, DIVISION 3,
No. A032845

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

A.I.U. INSURANCE COMPANY ET AL.,
Petitioners;

—v.—

SUPERIOR COURT OF THE COUNTY OF SAN MATEO,
Respondent;

OIL INSURANCE LIMITED,
Real Party in Interest.

Petition for review of Real Party in Interest DENIED.

BIRD

Chief Justice

[File-stamped
May 21, 1986]

Decision of the Superior Court, County of San Mateo,
Granting O.I.L.'s
Motion to Quash Service of Process

SUPERIOR COURT, STATE OF CALIFORNIA,

COUNTY OF SAN MATEO

PRESENT: HON. WILLIAM LANAM, *Judge of the Superior Court*

No. 278953, *Shell Oil Company v. Accident & Casualty Insurance Co. of Winterthur et al.*

Motion of Plaintiff for reconsideration and Modification
of
the Court's Order staying further proceedings

(May 9)

Michael R. Nave (Ptf)
Thorn Rosenthal (Ptf)
William S. Boyd (Ptf)
Barry L. Bunshoft (Deft.)
(list of other attys present attached.)

Submitted May 9, 1985

MEMORANDUM DECISION

The Court has once again reviewed the exhaustive memoranda, so graciously provided by various counsel in the above proceedings, and continues to conclude that without the involvement of O.I.L. this Court will not be able to render either complete or adequate relief and the action shall not proceed. As indicated in its earlier order, if O.I.L. is unwilling to voluntarily submit to the jurisdiction of the Court, then Shell should proceed by way of its

contractual arbitration prior to continuation of the present proceedings.

Further clarification of this Court's prior order appears necessary and in order that all issues might be resolved, the Court does conclude that it does not have personal jurisdiction over O.I.L. and that the motion to dismiss the cross-complaints against said corporation are granted. In support of said conclusion, the Court does find that it cannot ignore the London Forum selection/arbitration clause in the agreement between Shell and O.I.L., and that the documents and stipulations presented during the course of the proceedings do not support or provide a basis for finding "minimum contacts." It was thought that the above findings were implicit in the earlier rulings by the Court setting forth the stay. However, questions remained and the issue had to be met to facilitate any desired appellate review. The Court does amend its prior order to include a dismissal of the cross-complaints against O.I.L.

Defendant's request for attorneys fees under Section 128.5 is denied.

Attorneys for plaintiff shall prepare an order consistent with the findings and orders of this Court.

Dated: August 8, 1985

/s/ WILLIAM LANAM
William Lanam
Judge of the Superior Court

Order of the Superior Court, County of San Mateo, Granting O.I.L.'s Motion to Quash Service of Process

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

No. 278953

SHELL OIL COMPANY,

Plaintiff,

v.

ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR, et al.,

Defendants.

Order Staying Proceedings and Granting Motion to Dismiss Cross-Complaint Against O.I.L. Ltd.

This Court having reviewed the memoranda submitted on Shell's motion for reconsideration and the Court having heard the arguments of counsel at the hearing thereon on May 9, 1985, and,

This Court having concluded in its decision dated August 8, 1985 that without the involvement of O.I.L. this Court will not be able to render either complete or adequate relief and the action should not proceed,

IT IS ORDERED that:

1. All present proceedings are stayed pending either the submission by O.I.L. to the jurisdiction of this Court in the present proceedings or completion of London arbitration proceedings between Shell and O.I.L.; and

2. The cross-complaints against O.I.L. are dismissed because of the presence of the London forum selection/arbitration clause in the agreement between Shell and O.I.L. and because of the absence of minimum con-

tracts between O.I.L. and California sufficient to establish personal jurisdiction over O.I.L.

DATED: September 17, 1985

/s/ WILLIAM LANAM
William Lanam
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 27, 1986, I served the within Brief in opposition to Petition for a Writ Of Certiorari in re: "Oil Insurance Limited v. Superior Court of the State of California, County of San Mateo" in the United States Supreme Court, October Term 1985, No. ;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 27, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

No. 85-1977

Supreme Court, U.S.
FILED
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OIL INSURANCE LIMITED,

Petitioner,

—against—

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,

—and—

A.I.U. INSURANCE COMPANY, AMERICAN HOME INSURANCE COMPANY, BIRMINGHAM INSURANCE COMPANY, CHUBB & SON INC., FEDERAL INSURANCE COMPANY, FROUDE AND COMPANIES, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MISSION INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, SEA INSURANCE COMPANY, LTD., SUN INSURANCE COMPANY, AND THE TRAVELERS INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT THE TRAVELERS INSURANCE COMPANY IN OPPOSITION

Of Counsel:
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June 27, 1986

12 pp

QUESTIONS PRESENTED

1. In a declaratory judgment suit alleging that hundreds of insurers have coverage obligations to a common insured, whether the California courts properly exercised jurisdiction over a Bermuda-based insurance company that has collected 15 percent of its premiums from companies headquartered in California and that has paid over $25 million on claims for losses occurring in that State.

2. Whether, in such a suit, the insurance companies named as defendants may cross-claim for allocation under California law against the insured's captive insurance company, or whether such suit is barred by reason of an arbitration agreement between the insured and its captive insurer.*

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* The caption of the case in the Court contains the names of all the parties to the proceedings in the court below. The Travelers Corporation is the parent corporation of The Travelers Insurance Company. The following are subsidiaries (except wholly owned subsidiaries) and affiliates of The Travelers Insurance Company: The Travelers Indemnity Company; The Travelers Life and Annuity Company; The Travelers Life Insurance Company; The Travelers Indemnity Company of Rhode Island; The Phoenix Insurance Company; The Charter Oak Fire Insurance Company.

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1977

OIL INSURANCE LIMITED,

Petitioner,

—against—

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO,

—and—

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ON PETITION FOR A WRIT OF CERTIORARI
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THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT THE TRAVELERS INSURANCE COMPANY IN OPPOSITION

STATEMENT OF THE CASE

The Shell Oil Company ("Shell") has sued approximately 250 of its insurers in a declaratory judgment action in the California Superior Court for San Mateo County seeking a comprehensive declaration of coverage obligations with respect to Shell's possible liability for clean-up costs at waste disposal sites in Colorado and California. The defendants are located variously in the United States, the United Kingdom, Germany and Switzerland, and issued policies to Shell at various times between 1942 and 1983. The only Shell insurer that Shell did *not* sue is the Petitioner Oil Insurance Ltd. ("O.I.L."), a captive insurer which Shell owns as a shareholder with other oil companies that are also stockholder-insureds. Many of the 250 insurers named by Shell in the California action have served cross-claims against O.I.L., seeking allocation of indemnity and defense costs under the principles articulated in *Aetna Casualty & Surety Co.* v. *Certain Underwriters at Lloyds of London,* 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976).

O.I.L. moved to quash service and to dismiss the cross-claims for want of personal jurisdiction on January 4, 1985, asserting both that it lacked "minimum contacts" with the State of California and that its insurance contract with Shell provided that arbitration in London is the exclusive mechanism for contesting the scope of coverage provided by O.I.L.

The San Mateo Superior Court found that O.I.L. was not subject to California jurisdiction but noted that Shell had selected California as the forum for a comprehensive determination of its insurance rights under numerous policies "while attempting to exclude from the state court jurisdiction an important party to the litigation, namely O.I.L." Accordingly, "in the interest of affording comprehensive

equitable relief to all parties", the trial court stayed all proceedings pending either O.I.L.'s submission to jurisdiction or the conduct of arbitration proceedings between Shell and O.I.L. Travelers Supplemental Appendix at 1a.* The Court of Appeal of the State of California *reversed,* holding that California had personal jurisdiction over O.I.L. in the coverage dispute (11a). The Supreme Court of California denied O.I.L.'s petition for review (13a).

In an argument improperly addressed to the merits of the cross-claims, O.I.L.'s Statement of the Case argues that the O.I.L. policies are inapplicable because they cover only occurrences that commence during the policy period. Petition at 3-4. Shell's complaint, however, does not date (or even define) the events constituting the occurrence or occurrences. The Travelers Insurance Company accepts the accuracy of O.I.L.'s Statement of the Case from the last paragraph beginning on page 4.

ARGUMENT

O.I.L. asserts that its contacts with the State of California are too attenuated and insubstantial to support the reasonable expectation that O.I.L. would be subject to suit in California. In aid of its Petition, O.I.L. claims spurious affinities between the jurisdictional issues in this case and a different California case in which this Court has issued a writ of certiorari. *See Asahi Metal Industry Co., Ltd.* v. *Superior Court,* 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), *cert. granted,* 106 S. Ct. 1258 (1986). In *Asahi,* jurisdiction over a Japanese company was based upon the use of an allegedly defective Japanese-made com-

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* Page citations to: "—a" refer either to the appendix to the Petition or, where specifically noted, to the Supplemental Appendix to this Response.

ponent in a product sold to consumers in the United States. O.I.L.'s extensive and systematic contacts with the California forum offer no useful parallels with *Asahi* for purposes of review by this Court: *

> A. Since 1972, O.I.L. has collected over $145 million in premiums from three California shareholder-insureds and has provided to them worldwide coverage, including liability for risks in California. California companies paid approximately fifteen percent of all premiums collected by O.I.L. since 1972.
>
> B. Many of O.I.L.'s shareholder-insureds do business in California. O.I.L. sends agents into California to adjust claims on losses occurring in California, and has paid over $25 million for such losses.
>
> C. Shell itself has paid $50 million in premiums to O.I.L. since 1976. Shell has averred in papers filed in the declaratory judgment action that it "has had substantial operations in California since prior to 1975 . . . [and that] [o]ne of the two sites that are the subject of the underlying claims is in California."

O.I.L. asserts that the California courts rel[ied] upon *Asahi* and proceeds to adduce parallels between the two cases. Petition at 8-9. Such parallels were not drawn by the California courts, however, which did not rely on *Asahi* at all. The Court of Appeal referenced *Asahi* twice, but only (a) to quote a Third Circuit decision discussed in *Asahi* and (b) to illustrate by example that there are more jurisdictional cases dealing with manufactured goods than with insurance (5a). The opinion then proceeds (5a-10a)

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* Most of the jurisdictional facts are the subject of stipulation. *See* 2a.

to build its analysis and its holding upon insurance cases and the stipulated jurisdictional facts. O.I.L. cannot use *Asahi* as a vehicle for reaching this Court.

O.I.L.'s argument that the public interest requires that overseas mutual insurers be exempt from "burdensome litigation in the United States courts" does not merit extended rebuttal.* Shell and the other shareholders of O.I.L. have caused O.I.L. to enter into arbitration agreements with themselves in their role as policyholders. As a result, O.I.L. argues, Shell's other insurers cannot litigate O.I.L.'s allocation and contribution duties anywhere but in London arbitration proceedings—as though Shell's other insurers are somehow bound by an arbitration agreement that none of them has ever signed.

Thus Shell's captive insurer seeks to insulate itself from the operation of California's defense-sharing and insurance-allocation rules, while Shell seeks global resolution of its coverage disputes with everyone else. Such an arrangement serves no public policy.

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* O.I.L. asserts that it did not reasonably anticipate being haled into an American court; however, O.I.L. is not a stranger to coverage litigation in the United States, having participated as a party in *Odeco, Inc.* v. *Avondale Shipyards, Inc.*, 663 F.2d 650 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
June 27, 1986

Respectfully submitted,

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June 27, 1986

Order of the Superior Court of the State of California
In and For the County of San Mateo
(April 15, 1985)

SUPERIOR COURT, STATE OF CALIFORNIA,

COUNTY OF SAN MATEO

No. 278953

PRESENT: WILLIAM LANAM,

Judge of the Superior Court

SHELL OIL COMPANY

v.

ACCIDENT & CASUALTY INSURANCE CO. OF WINTERTHUR, *et al.*

1. Cross-defendant Oil Insurance Limited's Motion to Quash Service and Dismiss for lack of Personal Jurisdiction.
2. Defendants European General Reinsurance Co. of Zurich and Swiss Reinsurance Company-Zurich's Motion to Quash Service of Summons and Dismiss the Complaint.

Submitted March 13, 1985

DECISION

It is the order of this Court that the motion of defendants European General Reinsurance Company of Zurich and Swiss Reinsurance Company-Zurich (the Zurich insurers) to dismiss the complaint for lack of in personam jurisdiction

is hereby denied. Defendants are granted thirty days to demur, answer, or otherwise plead.

It seems apparent to this Court that Shell Oil has selected the fair County of San Mateo in the bountiful State of California as a forum to determine its rights and obligations under various contracts of insurance with numerous companies while attempting to exclude from the state court jurisdiction an important party to the litigation, namely, O.I.L. At the time of its forum selection Shell Oil was aware that its contract with O.I.L. had selected a forum far removed from the Western Coast of the United States.

By virtue of the relief being sought by Shell Oil, its relationship with O.I.L. as an insured, and in the interest of affording comprehensive equitable relief to all parties, the present proceedings will be stayed pending either the submission by O.I.L. to the jurisdiction of this Court in the present proceedings, or the completion of London arbitration proceedings dictated by the contract between Shell Oil and O.I.L.

(ENDORSED)
FILED
APR 18 1985

MARVIN CHURCH, county clerk
By ANNA MAES
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1977

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

OIL INSURANCE LIMITED,
Petitioner,

- against -

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO
and
A.I.U. INSURANCE COMPANY, et al.,
Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

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No. 85-1977

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OCTOBER TERM, 1985

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO
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Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

I
PRELIMINARY STATEMENT

OIL Insurance Limited (O.I.L.) submits this Reply Brief, pursuant to Rule 22.5, solely to address arguments first raised in the Briefs In Opposition of The Travelers Insurance Company and of AIU Insurance Company *et al.*

II
LEGAL ANALYSIS

A. Providing Coverage For Three Non-Party California Companies And Paying For Unrelated California Losses Does Not Make O.I.L. Sufficiently "Present" To Be Subject To Jurisdiction For Claims Not Arising Out Of O.I.L.'s Forum-Related Economic Activity

Until the California Court of Appeal ruled in the present action, no case had ever held that the principal place of business of a few of a foreign insurance carrier's insureds renders that carrier subject to jurisdiction there in a suit involving a different insured, whose principal place of business is in a different state. According to the lower court, a foreign-based mutual insurer like O.I.L. is sufficiently "present" for jurisdictional purposes in any forum where one of its insureds does significant business or has paid a significant claim and the carrier can be sued there irrespective of whether the carrier or the underlying lawsuit has any legitimate connection to the chosen jurisdiction.

That analysis—adopted by Respondents—is overly broad, imposes undue burdens on foreign mutual insurance companies set up by their insureds, and ignores the constitutional requirements for determining "jurisdictional presence" when the claims in question do not arise out of the defendant's forum-related economic activity. Given that insureds are increasingly turning to offshore insurers with the aid and encouragement of Congress (witness the recent tax treaties with Bermuda and Barbados), this issue is of great importance and is likely to be a recurring problem if not settled definitively.

The present case does not involve a claim by any of O.I.L.'s three California resident-insureds or any effort to enforce a California judgment, returned in favor of a California resident or in favor of anyone else. Nor does this case involve a business transaction of any kind between O.I.L. and Respondents (or anyone else) that took place in or otherwise involves California. O.I.L.'s 37 shareholders/policyholders are large petroleum companies with assets and headquarters around the world. Most are multi-nationals and many are based in Europe, Canada or else-

where outside the United States. General jurisdiction is no more appropriate in California in this case than it would be in Indonesia, the Persian Gulf or in the middle of the North Sea, where O.I.L. shareholders/policyholders also have significant assets and operations.

Respondents offer no authority—and there is none—establishing the propriety of jurisdiction in any of these locales over a dispute with which they have no connection and in which they have no interest. Moreover, since the claims in question do not arise out of O.I.L.'s California-related economic activity, it is necessary to do what Respondents do not: determine whether O.I.L.'s contacts with California are so extensive or wide-ranging as to make O.I.L sufficiently "present" in California to support jurisdiction over O.I.L. *E.g., Sanders v. CEG Corp.,* 95 Cal.App.3d 779, 784 (1979). That determination, in turn, requires an analysis of "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977).

Respondents do not—and cannot—establish a significant relationship between O.I.L. and California. O.I.L., like the automobile distributor in *World-Wide Volkswagen, Corp. v. Woodson,* 444 U.S. 286 (1980), and the tire valve manufacturer in *Asahi Metal Industry Co., Ltd. v. Superior Court,* 39 Cal.3d 35 (1985), cert. granted, 106 S.Ct. 1258 (1986), is a foreign corporation with no office, property or agents in California.[1] Similarly O.I.L., like the defendants in *World-Wide* and *Asahi,* did nothing to avail itself of the privileges and benefits of forum law. O.I.L. has never solicited or issued insurance policies in California. *A.I.U. Insur-*

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[1] The Travelers asserts: ". . . . O.I.L. is not stranger to coverage litigation in the United States, having participated as a party in *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650 (5th Cir. 1981)." The Travelers Brief in Opposition, p. 5 fn. *Odeco,* however, took place in Louisiana which, unlike California, specifically authorizes direct actions against insurers, La. Rev. Stat. Ann. § 22:655 (West 1978). Further, unlike the instant action, both O.I.L. and its insured believed there was coverage—O.I.L. thus had no reason to challenge jurisdiction in *Odeco* because it was obligated to pay any resulting judgment against its insured whether or not it was in the suit.

ance Company, et al. v. Superior Court, 177 Cal.App.3d 281, 286 (1986).[2] O.I.L.'s premiums and coverage are also calculated and drafted for its insureds without regard to the location of any of their assets in California or their presence in that forum.

Moreover, O.I.L., *unlike* the defendants in *World-Wide* and *Asahi*, is not even the manufacturer of an allegedly defective product that flowed through the stream of commerce and eventually caused injury in the forum state. O.I.L.'s business consists solely of issuing insurance, worldwide in scope, to various petroleum companies, three of which happen to be California residents (but none of which is a party to the case in question) and of paying claims throughout the world, some of which have arisen in California.

Without question, O.I.L.'s three California resident insureds have paid significant premiums over the years for their worldwide coverage and O.I.L. has paid significant amounts on account of some of their losses that occurred in California. While those payments may demonstrate that O.I.L.'s *insureds* have a significant California "presence," they do not establish that the same is true of O.I.L. Nor do they "establish" that this dispute arose out of any forum-related economic activity—it obviously did not.

Respondents and the lower court accordingly support their assertion of jurisdiction upon a fatally-flawed syllogism:

Major Premise: A number of cases from *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) to *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir. 1986), have found that any "purposeful contact" between a foreign insurer and the forum is sufficient to subject the carrier to jurisdiction;

Minor Premise: O.I.L. has collected millions of dollars in premiums from its three California-headquartered insureds and

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[2] The contrary assertion at page 4 of A.I.U.'s Brief In Opposition is incorrect. As explained by the Court of Appeal: "All of O.I.L.'s insurance policies have been issued in Bermuda [177 Cal.App.3d at 286]. . . . The insurance policies sent to California were merely convenience copies, not binding contracts." *Id.*

has paid out millions of dollars on account of California losses in California;

Conclusion: Therefore, O.I.L.'s contacts with California satisfy the *McGee-Haisten* "purposeful contact" test, and O.I.L. is subject to California jurisdiction in the present case.

Respondents' syllogism, however, relies entirely upon cases involving claims that arose out of an insurance carrier's *forum-related economic activity*:

McGee involved a foreign carrier's refusal to pay benefits under a life-insurance policy issued in California on the life of a California resident (355 U.S. at 321);

McClanahan v. Trans-America Ins. Co., 149 Cal.App.2d 171 (1957), concerned a foreign carrier's refusal to pay a California judgment, arising out of a California accident, the investigation and defense of which had been directed and controlled in California by the carrier and;

Haisten involved the refusal by a foreign carrier to pay a California judgment, in favor of a California resident against a California-resident who carried the insurance (784 F.2d at 1395-1396).

A claim arising from "forum-related" economic activity is admittedly absent here and the jurisdictional questions posed by this case are, therefore, *not resolved* by any case cited by Respondents from this Court or any other. While they may be novel from a legal perspective, they are by no means unique and will no doubt recur. Given the increasing use of mutual-type insurance companies, particularly by businesses with worldwide operations, the issues here in question are bound to reappear with increasing frequency. Unless this Court acts to clarify the situation, other litigants are obviously going to try to duplicate the California example in the state of their choice. Certiorari should issue so that needed clarification will be provided.

B. A.I.U.'s Suggestion That Shell Did Not Sue O.I.L. For Collusive Reasons Is Unfounded And Based On Multiple Factual Misstatements

A.I.U. hints darkly that Shell and O.I.L. are engaged in some collusive course of action, noting "[t]he only insurance company which Shell did not sue was its own captive insurer, O.I.L., which has provided Shell with comprehensive general liability coverage since 1976." A.I.U.'s Opposition Brief, p. 2-3.

While O.I.L. cannot imagine what bearing these charges—even if true—would have on the merits of O.I.L.'s certiorari petition, there is no need to engage in such conjecture, because A.I.U.'s innuendo is completely unfounded.

First, as A.I.U. itself later acknowledges, O.I.L., far from being Shell's "captive," is owned by and provides coverage "for 34 [actually 37] insureds." A.I.U.'s Opposition Brief, p. 4. Second, the term "occurrence"—as defined by the O.I.L. policy—is an event which *both* commences *and* causes injury during the policy term. Shell has been sued for pollution commencing in the 1940s and continuing to possibly the 1960s, but Shell has been an O.I.L. insured only since 1976. Accordingly, coverage under the O.I.L. policy is clearly excluded by the "occurrence" definition. Finally, Shell, O.I.L. and all of O.I.L.'s other shareholders have contractually agreed not to sue one another and to arbitrate their coverage disputes in London pursuant to New York law.

Thus, Shell's failure to sue O.I.L. reflects nothing more than Shell's decision not to pursue a pointless claim for coverage and to abide by its contractual obligation.

C. The Holding In Haisten In No Way Undermines The Fact That Arbitration Clauses In Truly International Contracts Should Be Entitled To Great Deference In The Jurisdictional Analysis

A.I.U. argues that the Court of Appeal's "ipso facto" dismissal of O.I.L.'s arbitration clause is in full accord with the Ninth Circuit's decision in *Haisten, supra,* 784 F.2d at 139.

Haisten involved a Cayman Islands insured formed solely to provide medical malpractice coverage for doctors who all practiced at a single, central California hospital, where the patients

would be overwhelmingly—if not exclusively—Californian. Thereafter, the California husband of a deceased California malpractice victim attempted to enforce a California judgment obtained against one of the insured California doctors. The District Court and Court of Appeal rejected the carrier's claim that the matter had to be arbitrated in the Cayman Islands noting that the carrier's activity was " 'purposefully directed' to participation in the California market." *Id.* at 1398.

Nothing in the *Haisten* opinion suggests that such clauses are irrelevant to the jurisdictional analysis when—as here—they are contained in a truly international commercial agreement that is in no way directed at California residents or the California insurance market. On the contrary, the presence of the arbitration clause in every policy O.I.L. issues internationally is simply a further indication of O.I.L.'s very legitimate expectation that it would not be involved in a coverage dispute in a California forum. O.I.L.'s legitimate expectations, moreover, cannot be ignored as A.I.U. contends. They are the focal point of the jurisdictional analysis.

III

CONCLUSION

Until the opinion in this case, no court has suggested that unrelated business activity, even if substantial, justifies the exercise of impersonam jurisdiction over a non-resident defendant in a forum that has no connection to, or interest in, the litigation. If the due process clause has an arm that long, this Court should say so. If it does not, this Court should so provide before other state and federal courts repeat the error to the substantial prejudice of worldwide mutual insurers.

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